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Supreme Court, U.S.
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No. 96-1142

In The

Supreme Court of the United States

October Term, 1996

THOMAS C. COLE, JR. M.D.,

Petitioner,

v.

HUNTSVILLE MEMORIAL HOSPITAL,

Respondent.

On Petition For Writ Of Certiorari To The Texas Court Of Appeals [First Dist.] Houston, Texas

RESPONDENT'S BRIEF IN OPPOSITION

KEITH S. DUBANEVICH
Counsel of Record

WILLIAM J. BOYCE
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
Telephone: (713) 651-5151
Facsimile: (713) 651-5246

Counsel for Respondent
Huntsville Memorial Hospital

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OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Did the court of appeals properly conclude that no state action was implicated when the Hospital decided not to renew Cole's staff privileges, given that

(1) Cole never pleaded a first amendment claim as to the Hospital;

(2) Cole never argued in the trial court, on appeal, or in the Texas Supreme Court that a different level of scrutiny should be afforded to the state action inquiry to accommodate his unasserted first amendment claim;

(3) the Hospital was not accused of racial discrimination against Cole, resulting in a more narrow construction of the state action concept;

(4) the Hospital, rather than the Walker County Hospital District, was ultimately responsible for daily maintenance and operation of its facility;

(5) no benefit to the Walker County Hospital District was directly attributable to the decision not to renew Cole's staff privileges;

(6) the Walker County Hospital District had no power to change the Hospital's decision, and did not directly or indirectly participate in the decision not to renew Cole's staff privileges; and

(7) Cole identifies no conflict between the decision below and any published decisions by this Court or any other court.

LIST OF PARTIES

Petitioner
Thomas Cole, M.D.
1203 Avenue J
P.O. Box 119
Huntsville, Texas 77340

Petitioner's Counsel:
C.L. Ray
400 W. 15th Street, Suite 600
Austin, Texas 78701

Respondent
Huntsville Memorial Hospital

Its Counsel:
Keith S. Dubanevich
William J. Boyce
1301 McKinney, Suite 5100
Houston, Texas 77010-3095

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STATUTES INVOLVED

Cole's reference to the first amendment is superfluous because Cole never pleaded a first amendment claim against the Hospital. App. at 39.

STATEMENT OF THE CASE

Respondent Huntsville Memorial Hospital incorporates by reference the statement of the facts from the opinion below.

The Hospital notes the following misstatements and omissions in the petition.

- Cole contends he was subjected to retaliation because of his activities while he was a member of the Walker County Hospital District Board. Petition at 11. However, the initial recommendation not to renew his privileges was made in August 1987. Cole was not elected to the district board until November 1987.

- Cole asserts that the Hospital District agreed to pay certain operating expenses. Petition at 7. These payments were merely advances which have since been repaid by the Hospital.

- Cole's references to the submission of a plan of operation for approval by the Hospital District (Petition at 8-9) are irrelevant because these provisions came into play only if the Hospital opted not to contract with a professional hospital management company. The Hospital contracted with HCA Management Company, Inc. and Quorum Health Resources to operate the Hospital. Therefore, the provisions with respect to

plans or approval of such plans by the Hospital District were not in effect.

- Contrary to Cole's assertion at page 15 of the Petition, the Hospital was not formed to carry out a public purpose of the Hospital District. The Hospital was incorporated in 1927; the Hospital District was not created until 1971.

REASONS FOR DENYING THE WRIT

The facts of this case do not raise the issue put forth in Cole's petition.

Cole's petition berates the court of appeals for "choosing to ignore the First Amendment claims" (Petition at 18) and for not considering whether the state action standard "should require deference to the First Amendment" (Petition at 14). Cole's belated effort to conjure up a constitutional issue worthy of this Court's attention must be rejected because Cole

- did not assert a first amendment claim against the Hospital; and
- did not argue to any court below that the conventional standards for determining whether state action occurred should be altered based upon the presence of his purported first amendment claims.

In essence, Cole (who has been represented by counsel throughout these lengthy legal proceedings) complains that the court of appeals erred by failing to consider claims he never asserted, arguments he never made, and theories he never raised.

I. Cole Pleaded No First Amendment Claims Against The Hospital

Paragraph 26 of Cole's live pleading complains in generic fashion that the Hospital deprived him of "rights, privileges, or immunities secured by the Constitution and laws under color of law." App. at 39. Nowhere in that pleading does Cole refer to the first amendment or free speech rights in connection with his claims against the Hospital.

Cole's petition tries to obscure this fact by combining cites to his pleading against the hospital with cites and quotes from a *separate* lawsuit asserting *separate* claims against a *separate* group of defendants – namely, a collection of individual doctors. *See* Petition at 12-13 (citing "App. at 44, 45" and "App. at 37-45").

Unlike Cole's generic complaint in his pleading against the Hospital (App. at 39), his pleading against the individual doctors (beginning at page 40 of his Appendix) specifically alleged that Cole's "legal right to free speech" had been abridged by the individual doctors. App. at 44.

Of course, Cole's complaints against the individual doctors are immaterial for purposes of section 1983 because the actions of these private citizens were not alleged to constitute – and cannot constitute – state action. Cole's claims involving the individual doctors were resolved on independent and adequate state law grounds when the court of appeals affirmed the striking of all of Cole's claims as a proper sanction for discovery abuse under state procedural standards. App. 17-27. *See, e.g., Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935)

(Supreme Court's "jurisdiction fails" if state court judgment rests upon independent and adequate state law grounds).

When one focuses solely upon Cole's pleading against the Hospital, it becomes apparent that the first amendment claim discussed in his petition for writ of certiorari is an after-the-fact invention. Global references to the "Constitution of the United States," the "Constitution and laws of the United States," or similarly broad phrases are insufficient to raise a federal question predicated on a particular portion of the federal Constitution. *Webb v. Webb*, 451 U.S. 493, 496-98 (1981); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935); *Harding v. Illinois*, 196 U.S. 78, 88 (1904); *Capital City Dairy Co. v. Ohio*, 183 U.S. 238, 248 (1902); *F. G. Oxley Stave Co. v. County of Butler*, 166 U.S. 648, 655 (1897).

As Cole's own appendix makes plain, he asserted no first amendment claim against the Hospital. It follows that he cannot now inject such a claim into this case in a belated effort to put a first amendment spin on this run-of-the-mill fight over hospital privileges.

II. Cole Never Argued Below That Free Speech Interests Are Implicated, Or That Such Interests Mandate A Different State Action Analysis

Cole's tactic cannot succeed even if one assumes he pleaded a first amendment claim against the Hospital with sufficient particularity. Cole never asserted below that the presence of this purported first amendment claim required a different level of scrutiny in connection with

the inquiry into whether the Hospital's activities constitute state action.

Cole appealed from the state trial court's grant of summary judgment in favor of the Hospital. Cole's response to the Hospital's motion for summary judgment neither mentions the first amendment nor asserts that the state action issue should be evaluated differently due to the presence of purported first amendment claims. App. at 47-56.

In his summary judgment response, Cole framed the constitutional issue *solely* in terms of whether (1) he enjoyed a protected property interest in the continuation of his medial staff privileges at the Hospital; and (2) he was deprived of this asserted property interest without due process. App. at 50-51. Although the court of appeals noted Cole's newly raised contention on appeal that he had asserted a first amendment claim against the Hospital (App. at 4), the court's opinion did not address that purported claim separately in conformity with state procedure precluding consideration on appeal of grounds for defeating summary judgment that were not raised by the non-movant in its response to the summary judgment motion. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 677-79 (Tex. 1979); *see also Beck v. Washington*, 369 U.S. 541, 549-54 (1962) (federal question must be raised in state court in the manner and with the degree of specificity required by state rules of practice).

In any event, Cole never asserted below that the state action inquiry should be handled differently based upon the presence of purported free speech violations. App. at 51-56. Instead, he relied upon *Jatoi v. Hurst-Euless-Beford*

Hospital Auth., 807 F.2d 1214 (5th Cir. 1987), *cert. denied*, 484 U.S. 1010 (1988). App. at 54-55. The court of appeals properly recognized that *Jatoi* is inapplicable because it involved claims of racial discrimination which are absent here. App. at 7. The court then predicated its state action analysis on the factors enumerated in *Albright v. Longview Police Dept.*, 884 F.2d 835, 841 (5th Cir. 1989), and *Greco v. Orange Memorial Hosp. Corp.*, 513 F.2d 873, 877 (5th Cir.), *cert. denied*, 423 U.S. 1000 (1975). App. at 7-11.

Cole's application for writ of error to the Texas Supreme Court makes no mention whatsoever of his new-found contention that the state action inquiry should be affected by the presence of purported free speech interests. App. at 74-76. Cole merely quibbles with the court of appeals' weighing of the non-speech factors discussed in *Jatoi*, *Albright*, and *Greco*. App. at 74-76. In fact, the petition for writ of certiorari itself really does not take issue with the court of appeals' analysis of these three cases; instead, Cole criticizes that court for failing to consider a factor he never asked it to consider. *See* Petition at 18.

This Court will not review a judgment rendered by the highest court of a state unless the claimed federal question at issue has been raised and decided in the state court below. *Yee v. Escandido*, 503 U.S. 519, 533 (1992) (in reviewing judgments of state courts under 28 U.S.C. § 1257, Court will refuse to consider claims that were not raised or addressed below); *Illinois v. Gates*, 462 U.S. 213, 217-18 (1983) (same). *See also Beck v. Washington*, 369 U.S. at 550-53 (because petitioner failed to raise argument in state court that state statute denied equal protection, question was not before the Supreme Court); *Herndon v.*

Georgia, 295 U.S. at 443 (failure to follow the appellate channels provided by the state court is fatal).

Cole's utter failure to present his free speech theory for consideration by the Texas state courts is sufficient by itself to justify denial of the petition for writ of certiorari. Cole's simultaneous failure to explain precisely how the court of appeals' decision in this case conflicts with any other cases addressing the state action question underscores the lack of merit of his petition. *See* Petition at 18.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

KEITH S. DUBANEVICH
Counsel of Record

WILLIAM J. BOYCE
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
Telephone: 713/651-5151
Telecopier: 713/651-5246

Counsel for Respondent
Huntsville Memorial Hospital